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IN THE

United States Supreme Court

OCTOBER TERM, 1984

ROBERT ABRAMS, Attorney General of the State of New York,
Petitioner,

—v.—

MICHAEL MCCRAY,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prosecutor's use of peremptory challenges to exclude all black and hispanic jurors in a criminal case is consistent with the defendant's right to be tried by a jury drawn from a representative cross-section of the community, as guaranteed by the Sixth and Fourteenth Amendments?

2. Whether this Court's holding in Swain v. Alabama, 380 U.S. 202 (1965), forbids a finding that a prosecutor's use of peremptory challenges to exclude all black and hispanic jurors in a criminal case violates equal protection absent statistical evidence establishing a pattern and practice of such exclusions and, if so, should that holding now be modified to prohibit intentional race discrimination?

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Respondent Michael McCray submits this brief in opposition to the petition for certiorari seeking review of the judgment entered in this action by the United States Court of Appeals for the Second Circuit on December 4, 1984.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York is reported at 576 F.Supp. 1244 (1983). The opinion of the United States Court of Appeals for the Second Circuit is reported at 750 F.2d 1113 (1984). The opinion of the Second Circuit declining to reconsider the panel decision en banc is not yet reported. It is, therefore, included as

an appendix to this brief.[1]

JURISDICTION

Respondent acknowledges that the petition for certiorari was timely filed and that this Court's jurisdiction has been properly invoked under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Michael McCray is a young black man who was convicted by an all white jury of first and second degree robbery based solely on identification testimony.

The robbery occurred in downtown Brooklyn during the evening of November 15, 1978. Philip Roberts, a local art student, had just withdrawn twenty dollars from an automatic bank machine when he was surrounded

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1 The en banc order was issued by the Second Circuit on March 4, 1985, the same date that the petition for certiorari was filed in this Court.

by several youths, pushed into the vestible of an apartment building and robbed at gunpoint. McCray was arrested three weeks later when Roberts, who is white, picked him out while cruising the neighborhood in a police car. No one else was ever arrested for the crime. McCray had never been arrested before and has not been arrested since.[2]

Two trials then ensued. The first trial ended in a hung jury with three black jurors in favor of acquittal.[3] The second trial ended in conviction and concurrent sentences of 2-6 years on the charge of first degree robbery and 1-1/2 to 4-1/2 years on the

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2 McCray has remained free on bail during his post-conviction proceedings.

3 Throughout this litigation, petitioner has contended that only two of three minorities on the initial jury voted to acquit.

charge of second degree robbery.

In the process of selecting a jury for the second trial, the prosecution exercised either eleven or twelve peremptory challenges.[4] Eight of those challenges were used to excuse the only minority members drawn for the jury panel: seven blacks and one hispanic.[5]

Asserting that the prosecutor's action violated the federal Constitution as well as New York State law, respondent moved for a mistrial or, alternatively, for an inquiry to determine whether the prosecutor's use of her

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4 The record is ambiguous on the exact total of peremptory challenges used by the prosecution.

5 Contrary to petitioner's suggestion, Pet. at 4, there is no indication in the record that defense counsel challenged any minority jurors. Indeed, McCray's trial attorney submitted an affidavit to the district court, which stated: "I do not recollect challenging any [minority jurors], and I recollect [the prosecutor] challenging all."

peremptory challenges was based, as it appeared, exclusively on race.[6] Those motions were denied by the trial judge and voir dire continued.

The jury that convicted McCray was composed entirely of whites. After conviction McCray moved for a new trial, alleging again that the use of peremptory challenges to create an all white jury violated his right to "a jury of his own peers" under "our Constitution." That motion, too, was denied by the trial judge, who concluded on the basis of this Court's decision in Swain v. Alabama, 380 U.S. 202 (1965), that the use of peremptory challenges

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6 In support of his motion, defense counsel pointed out that the minority jurors excluded by the prosecution shared nothing in common except their race. One black juror was excluded by the prosecution even though his relative had been a crime victim -- a fact that would normally be thought to favor the prosecution.

in a particular case is immune from inquiry. Neither decision by the trial judge contains any finding on the critical question of whether the prosecutor actually utilized her peremptory challenges to exclude minority jurors. Indeed, the trial judge considered that question so legally irrelevant that he never sought any explanation for the undisputed fact that every black and hispanic on the jury panel was peremptorily excused by the prosecutor.[7]

On direct appeal, McCray's conviction was affirmed without opinion by the Appellate Division, 84 A.D.2d 769, 444 N.Y.S.2d 972 (2d Dept. 1981), and in a 4-3 decision by the New

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7 Petitioner incorrectly asserts that the trial judge's written decision on respondent's motion for a mistrial found as a fact that the prosecutor's use of her peremptory challenges was not race-based. Pet. at 4. Given his view of the law, the trial judge considered that question of no import whatsoever. 104 Misc. 2d 782, 429 N.Y.S.2d 158 (Sup.Ct. Kings Co. 1980).

York Court of Appeals. 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982). The majority dismissed McCray's federal claim by relying on Swain and then refused to "depart[] from this holding" in construing New York's own Constitution.

McCray's petition for certiorari was denied by this Court on May 31, 1983. __ U.S. ___, 77 L.Ed.2d 1322 (1983). Justices Marshall and Brennan dissented from the Court's decision. Id. at 1323. In addition, three other members of this Court explained in a separate concurring opinion that their vote to deny certiorari reflected a desire for the lower state and federal courts "to serve as laboratories in which the issue receives further study before it is addressed by this Court." Id. (concurring opinion of Justices Stevens, Blackmun and Powell).

Following an unsuccessful effort to obtain reargument from the New York Court of

Appeals in light of this Court's opinions, 60 N.Y.2d 587, 467 N.Y.S.2d 1031 (1983), McCray brought the present action for a writ of habeas corpus in the Eastern District of New York pursuant to 28 U.S.C. §2254. The district court's decision to grant a conditional writ rested on two independent holdings. 576 F.Supp. 1244 (1983). First, the district court ruled that the Equal Protection Clause "prohibits racial discrimination not only because race is almost always irrelevant but also because distinctions based on race are invidious." Id. at 1248. Second, the district court held that the racially discriminatory use of peremptory challenges is inconsistent with a defendant's Sixth Amendment right to a jury drawn from a fair cross-section of the community. Id.

The district court scrutinized the record and found that "[e]ven if all the

relatively minor factual uncertainties in the record are resolved in [the prosecution's] favor, the record still makes out a prima facie case of discrimination." Id. at 1249. Petitioner's post-judgment motion for a federal court hearing to examine the use of peremptory challenges during a state court voir dire almost four years earlier was rejected by the district court in a brief order.

In an exhaustive opinion, the Second Circuit affirmed the district court's key holding that the prosecutor's use of peremptory challenges on racial grounds is unconstitutional. 750 F.2d 1113 (1984). Unlike the district court, however, the Second Circuit based its decision entirely on

the Sixth Amendment.[8]

Judge Kearse carefully examined this Court's Sixth Amendment rulings and concluded that, "whatever the stage of the selection process . . . the state is not permitted by the Sixth Amendment to restrict unreasonably the possibility that a petit jury will comprise a fair cross section of the community." Id. at 1129. The Second Circuit also upheld the district court's finding that a prima facie case had been established by unrebutted evidence that the prosecutor eliminated every potential minority juror. Id. at 1133.

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8 The Second Circuit decision can hardly be viewed as an endorsement of Swain. With evident reluctance, Judge Kearse wrote: "While the assaults on Swain are not without considerable force, we are constrained to note that, on the question of the vulnerability of the prosecution's use of peremptory challenges to attack under the Equal Protection Clause, Swain is clear, direct, and unequivocal." 750 F.2d at 1123-24.

The Second Circuit disagreed with the district court's refusal to grant a hearing, however. Citing "principles of federalism and comity," the case was remanded to the district court for a hearing on the prosecution's "proffered rebuttal of the prima facie case established by McCray." Id. at 1134.

That hearing, which petitioner sought, has never been held. Instead, petitioner has chosen to seek certiorari on constitutional issues that are not disputed. The fact that petitioner and respondent both disagree with the premises of Swain apparently played a role in the Second Circuit's decision not to reconsider en banc the panel opinion. (A.3-4). As noted by Judge Newman:

> [T]he appropriateness of en banc reconsideration is undermined by the lack of adversity between the litigants on the central issue in this case: The prosecutor agrees with the defendant

> that the state may not systematically use peremptory challenges against Blacks and Hispanics in the absence of reasons unrelated to race or national origin. The only dispute presented by the prosecutor is whether such reasons exist in this case, a matter the panel has returned to the District Court for determination.

For similar reasons, the petition for certiorari should be denied. No one doubts that the issues raised by this case are extremely important. But this is neither the case nor the time to review such important constitutional questions.

REASONS FOR DENYING THE WRIT

I. THE PARTIES AGREE ON THE CRITICAL LEGAL ISSUES RAISED BY THIS CASE

Petitioner has presented four questions for this Court's review. The first two questions raise legal issues that are not disputed by the parties. The third question involves factual matters that do not merit this Court's immediate attention. And the fourth question is entirely derivative of the first three. In short, none of the questions proposed by petitioner is sufficient to invoke this Court's discretionary jurisdiction.

Understandably enough given the decision below, petitioner's first question is whether the use of peremptory challenges to disqualify jurors on racial grounds violates the fair cross-section requirement of the Sixth Amendment. See Taylor v. Louisiana, 419 U.S. 522 (1975). The Second Circuit answered that

question in the affirmative, and both petitioner and respondent agree with the Second Circuit's result. This consensus on the critical constitutional issue presented by the petition for certiorari renders this case inappropriate for review. See New Jersey v. T.L.O., ___ U.S. ___, 82 L.Ed.2d 881, 882 (1984)(Stevens J., dissenting from reargument order). The significance of the constitutional issue and its potential impact on the administration of justice throughout the country only reinforces the importance of a truly adversarial presentation.

Likewise, the parties agree on the second question presented -- whether Swain ought to be modified to permit an equal protection attack upon the use of peremptory challenges in a particular case, assuming, of course, a proper evidentiary showing. This Court need not and should not reach out to decide constitutional issues that are not

contested. "The fact that it would be convenient for the parties and the public to have promptly decided whether the [practice] assailed is valid," Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring), is simply not a basis for certiorari.[9]

The third question proposed by petitioner challenges the finding that a prima facie case of racial discrimination has been established. While the existence of a prima facie case is a matter of genuine dispute, the dispute is primarily factual. As this

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9 The prudential considerations underlying the certiorari decision are separate and distinct from the case or controversy requirements of Article III. Petitioner's ongoing desire to put respondent in jail clearly creates Article III jurisdiction. INS v. Chadha, ___ U.S. ___, 77 L.Ed.2d 317, 337 (1983). Legally, the parties disagree over the existence of a prima facie case and the proper allocation of the burden of proof.

Court has often noted: "We do not grant a certiorari to review evidence and discuss specific facts," United States v. Johnston, 268 U.S. 220, 227 (1925), especially where the finding of fact has been confirmed by two courts below. Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). Here, the district court's finding of a prima facie case, 576 F.Supp. at 1249, was expressly affirmed by the Second Circuit. 750 F.2d at 1133.

Finally, petitioner asks this Court to decide whether the Second Circuit opinion correctly allocates the burden of proof between the parties. That issue, however, cannot be reached without first deciding the undisputed question of whether or not a hearing is required. Petitioner's effort to separate procedure from substance is thus unsuccessful.

The procedural concerns identified by petitioner may well be significant, but they should not be decided now and they should not be decided in the first instance by this Court.

II. THE CONSTITUTIONAL ISSUES RAISED BY THIS CASE SHOULD BE FURTHER EXPLORED BY THE LOWER COURTS PRIOR TO REVIEW BY THIS COURT

In denying the petition for certiorari filed in this case two years ago, three members of this Court stressed "that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date." 77 L.Ed.2d at 1322 (concurring opinion of Justices Stevens, Blackmun and Powell). The Second Circuit decision below marks the beginning, not the end, of that period of exploration by the

federal court system.

Because the Second Circuit was deciding a particular case on particular facts, it inevitably left many undecided questions. It did not announce whether its constitutional holding extends to defense counsel as well as the prosecutor; it did not specify which "cognizable groups" other than blacks and hispanics are embraced within the fair cross-section requirement of the Sixth Amendment; and it did not anticipate many procedural issues that will undoubtedly arise once hearings are held in light of its decision.[10]

As a matter of sound judicial policy, this Court should wait until the lower courts have had an initial opportunity to grapple with these difficult questions. First, this

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10 Many of these questions were specifically identified by this Court as needing further consideration. 77 L.Ed.2d at 1323 n.*.

Court will undoubtedly benefit by the considered judgment of other tribunals. Second, the passage of time will provide this Court with an empirical base on which to rest its ultimate decision.[7]

Swain proceeded on the assumption that the system of peremptory challenges could not survive even a minimal inquiry into the prosecutor's motives. That assumption is only now being tested. While that test is underway, review by this Court would be premature.

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7 Some conflict among the Circuits, and between the state and federal courts, is almost inevitable during a period of experimentation. In this specific context, such conflict is not a reason for granting certiorari. To the contrary, it merely confirms that this Court is obtaining the percolation it desired before addressing a difficult constitutional question.

III. IMPORTANT CONSTITUTIONAL ISSUES SHOULD NOT BE DECIDED ON A CONTESTED FACTUAL RECORD

As matters now stand, this case has been remanded to the district court for a hearing to determine whether any discrimination actually occurred during jury selection at McCray's trial. On the present incomplete record, a constitutional adjudication by this Court is unnecessary and unwise.

Petitioner does not contend that the remand itself represents a constitutional injury. Indeed, petitioner concedes the propriety of an inquiry into the prosecutor's use of peremptory challenges once a prima facie case of discrimination is established. Any concern this Court might have about the burden of such an inquiry can be better assessed after a hearing is held.

The guiding principle of judicial restraint was summarized by Justice Jackson

in Kennedy v. Silas Mason Co., 334 U.S. 249, 257 (1948):

> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.

See also Board of Education v. Pico, 457 U.S. 853, 883-84 (1982)(White, J., concurring); Dombrowski v. Eastland, 387 U.S. 82 (1967).

These observations apply with equal force here.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: New York, New York
March 27, 1985

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL McCRAY,

Plaintiff-Appellee,

v. : 84-2026

ROBERT ABRAMS,

Defendant-Appellant.

A request for an in banc vote having been made by one of the active judges, and a poll of the judges in regular active service having been taken, a majority of the Court has voted not to reconsider the decision in banc.

WILFRED FEINBERG
Chief Judge

Dated: New York, New York
March 4, 1985

JON O. NEWMAN, Circuit Judge, concurring in denial of rehearing in banc:

The holding in this case is that the Constitution prevents the State of New York from systematically using its peremptory challenges against Black and Hispanic members of the jury venire in the absence of some plausible reason, not based on race or national origin, for doing so. The case is remanded for determination of whether such reason exists. The decision is important, both because of what it holds and because of the issues it raises for the future concerning the permissible use of peremptory challenges. Among these are whether the prosecution is similarly limited with respect to group-based challenges against persons identified other than by race or national origin, whether the remedy of striking the

venire is mandatory or only an option available to the defendant, and whether similar limitations on the exercise of peremptory challenges apply to a defendant. Language in the opinion of the panel majority touches on some of these issues.

In some circumstances, in banc reconsideration of a case of this magnitude would be warranted. Doing so would afford the full Court an opportunity to determine whether to endorse the holding, whether the constitutional principle underlying such a holding is the fair trial guarantee of the Sixth Amendment or the equal protection guarantee of the Fourteenth Amendment, and whether any authoritative guidance should now be given the trial courts concerning the unresolved issues raised by the panel ruling. However, the appropriateness of in banc reconsideration is undermined by the lack of adversity between the litigants on the

central issue in this case: the prosecutor agrees with the defendant that the State may not systematically use peremptory challenges against Blacks and Hispanics in the absence of reasons unrelated to race or national origin. The only dispute presented by the prosecutor is whether such reasons exist in this case, a matter the panel has returned to the District Court for determination.

In light of the prosecutor's litigating stance, this is not the case in which to determine the issues implicated by the panel's holding. Those issues can be expected to arise in future litigation, to be properly framed by adverse litigants, and to be carefully considered and resolved by future panels, and, if appropriate, by the full Court.

One of the most grievous assaults on the perception and substance of criminal justice is the trial of a Black defendant by an

all-White jury from which eligible Blacks have been excluded by action of the state because they are Black. The panel's holding imposes a constitutional bar upon state efforts to obtain such a pernicious result. In banc reconsideration of that holding, uncontested by litigants, is not warranted.

VAN GRAAFEILAND, Circuit Judge, concurring in the dissenting opinion of Judge Winter:

I concur fully in the dissent of Judge Winter. A decision that places defense attorneys in a position where, in order to avoid a claim of inadequate representation, they feel compelled to contest every exercise of a peremptory challenge by the prosecution on the ground that it is based on race, color, creed, sex or age, should have the support of more than two judges.

McCray v. Abrams, #84-2026
petition for en banc

WINTER, Circuit Judge, with whom VAN GRAAEFEILAND and MESKILL, Circuit Judges, join, dissenting from the denial of rehearing en banc:

The panel opinion is in my view a paradigm case for in banc consideration. It can hardly be denied that the issues raised are of "exceptional importance" within the meaning of Fed. R. App. P. 35(a). The decision, rendered by a sharply divided panel, is without federal precedent and alters the very nature of peremptory challenges by compelling scrutiny of the motive underlying the exercise of such challenges. Because it is a constitutional decision, it affects the manner in which juries are selected in every criminal case in the state or federal courts within this circuit.

The effects are likely to be dramatic.

For example, many federal courts presently permit only a limited voir dire of prospective jurors thus leaving prosecutors with little to go on in exercising peremptory challenges other than the membership of such a juror in a "cognizable group." Such membership, however, is an improper criterion for the exercise of such a challenge under the panel opinion. Major changes in the present practice of selecting juries may thus be necessary.

The consequences of this decision might seem less serious if the Supreme Court of the United States were likely to review this particular case. However, it appears that the "losing party," the Brooklyn District Attorney, sought the ruling in question and will not seek review in the Supreme Court. Indeed, she has praised the ruling as a "landmark decision," National L.J., Dec. 7, 1984 at 46, col. 1, and in a letter to the

editor of the New York Times, took credit for the panel decision, N.Y. Times, Dec. 21, 1984, at A43, col. 6. The present decision thus will become final upon the denial of rehearing, and all trial courts within this circuit will be obliged to comply with it.

Judge Newman concurs in the denial of rehearing on the grounds that the lack of adversity between the litigants limits the precedential effect of the panel decision solely to challenges based on race or national origin. It appears to be his position that the panel decision went farther than was necessary in light of the agreement among the parties that the equal protection clause applied. He concludes, therefore, that the rationale of the panel majority is not binding on succeeding panels. I do not share that view.

If the lack of adversity with regard to the equal protection clause undermines the

precedential effect of the panel decision, it does so in its entirety. A concession as to applicable law by a party to litigation does not bind parties to subsequent litigation. Had the panel simply accepted the concessions without regard to whether they were necessitated by or consistent with existing law, its decision would not be of any significance for future cases. In contrast, the panel decision has precedential effect precisely because the majority made an independent determination as to which concessions were consistent with existing law and which were not. [1]

I cannot agree, therefore, that future panels are free to ignore the rationale of

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[1] To the extent Judge Newman's concurrence in the denial of rehearing raises the issue of the appropriateness of the panel's addressing such far-reaching issues in a case lacking in adversity, he underlines the need for in banc consideration.

the panel decision. Judge Kearse's opinion laid out in great detail the reasons justifying the result reached. Briefly stated, it reasoned that the equal protection clause does not prohibit "the prosecution's racially discriminatory use of its peremptory challenges . . . in a single case," McCray v. Abrams, 750 F.2d 1113, 1124 (2d Cir. 1984), but that the sixth amendment prohibits peremptory challenges which exclude from a particular petit jury "a cognizable group in the community . . . on the basis of the individual venirepersons' group affiliation," id. at 1131-32. Judge Newman disagrees with this rationale albeit he would reach the same result. I would suggest that the only viable remedy for such a disagreement is to rehear the decision in banc, not to discard the rationale in the next case heard by a different panel. A circuit with thirteen active judges which sits in many different

panels cannot construct a coherent jurisprudence, or maintain a spirit of collegiality and courtesy among its members, if carefully considered decisional rationales may be routinely ignored by successive panels.

I therefore dissent from the denial of rehearing in banc.